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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 450

WILBURN E. SMITH,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. .....

WILBURN E. SMITH,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner, Wilburn E. Smith, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee (App. 1a) denying a petition for a writ of certiorari to the Court of Criminal Appeals of Tennessee, which court had affirmed the conviction of Petitioner (App. 16a) in the First Division of the Circuit Court of Hamilton County, Tennessee.

The docket entries reflecting the entire chronology appear in the Appendix (App. 17a-20a).

The charge was murder. Petitioner was convicted of murder in the first degree and sentenced to 99 years imprisonment.

Petitioner is presently imprisoned at the State Penitentiary, Nashville, Tennessee.

OPINION BELOW

A copy of the opinion of the Court of Criminal Appeals of Tennessee is appended (App. 2a-16a). It is reported as 452 S.W.2d 669.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. 1257, and to review the final decision of the highest court of the State of Tennessee.

The time within which this petition needs be filed is prior to August 2, 1970 (App. 21a).

STATEMENT

On September 23, 1967, a homicide occurred when Petitioner shot and killed Frank Hankins. The occurrence is not disputed.

On November 22, 1967, Petitioner was indicted and charged with first degree murder (App. 22a).

Shortly after the homicide, Petitioner's family engaged a young and inexperienced Chattanooga attorney to represent him. The record reflects that for a considerable time thereafter, nothing was affirmatively done by that attorney, the time being seemingly spent in negotiating a fee and in indecision as to what to do in defense of Petitioner. Several continuances were obtained without reasons shown on the record.

Present counsel for Petitioner was engaged about November, 1969, following a proper showing that prior counsel had been discharged.

Upon arraignment, former counsel had entered a plea of Not Guilty. Present counsel changed the plea to Not Guilty by Reason of Insanity, on January 6, 1969. The change in plea resulted from the ascertainment of the fact that Petitioner, then 31 years of age, had been a chronic alcoholic since the age of 15; that his alcoholism was involuntary and compulsive; that he had been confined in one or more Alcoholic Rehabilitation Hospitals and pronounced incurable; that he had been rejected by the Army under the Selective Service Act; that he suffered periods of extreme dejection, loss of memory and comprehension and at one time had attempted suicide; that for several days prior to the homicide he had been unaware of where he was or what he was doing, all of which was adduced upon the trial on March 12 and 13, 1969 in the First Division of the Criminal Court of Hamilton County, Tennessee.

Upon the prior-to-trial discovery of Petitioner's history of involuntary alcoholism, immediate preparations were made by present counsel to use the scientific-medical expertise of Dr. Melvin H. Knisely, whose existence first became known to counsel upon February 2, 1969, upon reading an announcement in a newspaper (App. 23a). Investigation revealed Dr. Knisely as undoubtedly one of two or three world authorities on the destruction of brain cells by alcoholism.

At the time of the learning of the potential of having Petitioner examined and tested by Dr. Knisely, only 24 days remained before the date set for trial. The assistance of Dr. Knisely was sought. An application for a continuance was made on February 17, 1969 in which application the purpose was fully stated. The application was granted and trial reset for March 12, 1969.

The shortness of the time prevented the pneumoencephalographic examination[1] by Dr. Knisely, whereupon, on his advice, arrangements were made for Petitioner's examination by Dr. Walter Boehm,[2] of Chattanooga, Tennessee.

The Trial Judge was fully advised of these plans for testing Petitioner. Upon application of Petitioner, an order was entered on March 4, 1969 (App. 23a-24a) directing the Sheriff to arrange and provide for Petitioner to be taken under guard from the Hamilton County Jail to the offices of Dr. Boehm, and for Petitioner's hospitalization in order to permit Dr. Boehm to make the examinations and tests in keeping with the unquestioned scientific truths resulting from voluminous studies conducted by experts.[3]

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[1] A scientifically proven test whereby spinal fluid is taken from the cavities of the brain into which cavities air is injected which then casts a shadow on the X-ray film, and which then permits the study of the sizes and shapes of the shadowed cavities from which conclusions can be made as to the irrevocable destruction of brain cells and resulting incompetency; this test is distinguished from the superficially imperfect and restricted tests by electroencephalographic measure of brain waves.

[2] A recognized neurosurgeon of exceptional skill and qualifications as an accepted expert witness.

[3] The attention of the Court is respectfully invited to the massive authorities concerning brain cell damage by alcoholism cited to the lower courts in this case, repetition here being burdensome, but particular attention is invited to the following: "When severely agglutinated [by alcohol] blood is passing through the sinusoids the centers of the lobules [of the brain] will have a reduced oxygen supply causing anoxia. With successive bouts of acute alcoholism, it is reasonable to expect that the central areas of the lobule will be damaged. Repeated damage and attempts at repair probably are major factors causing the known histopathology of the chronic alcoholic cirrhoses." **Alcohol, Sludge and Hypoxic Areas of Nervous System**, by Moskow, Pennington and Knisely, Dept. of Anatomy, Medical College of South Carolina, 1969, Microvascular Research 1, 174-185 (1968), supported by U. S. Public Health Service grants HE-04176, HE-07114 and HE-05340, and U. S. Navy Contract NDNR:441 (p. 183). See: Bancroft, J., "Respiratory Function of the Blood," Cambridge University. Hypoxia, caused by high altitudes, is similar to anoxia of acute alcoholism in that both forcibly

(Continued on following page)

The order of the Trial Judge dated March 4, 1969 was but eight days prior to the trial. Dr. Boehm, being extremely busy and committed to an extensive practice, could not arrange in that short interval of eight days for the testing of Petitioner, there being no space available in Erlanger Hospital, Chattanooga, Tennessee.

On March 10, 1969 a motion was made by Petitioner to cancel the trial set for March 12, 1969, so that the examination previously ordered by the Trial Judge could be had before trial (App. 25a). On March 12, the date of the trial, the Trial Judge, being all the time theretofore fully appraised of the circumstances, was advised that although Dr. Boehm had agreed, and in fact was anxious to do the tests on Petitioner, he had not been able to schedule the tests, hence a postponement of but short duration was asked. The Trial Judge caustically denied the continuance.[4] There was no showing that this sought short postponement would prejudice the State in this capital case.

(Continued from preceding page)

reduce the rate of oxygen supply to nerve cells and capillary linings causing similar symptomatology of emotional instability, sudden changes of mood from calmness to laughter to belligerence and back again. In non-technical words, alcoholic beverages when consumed regularly, cause brain cells to die with as much finality as if destroyed by trauma. Comprehension and will disappear. Incompetency and insanity result. The availability of this evidence, essential and material to his defense was denied Petitioner. The evidence to have been adduced by the testimony of Dr. Boehm would have gone to Petitioner's innocence by insanity, or directly to his guilt of murder in a lesser degree than murder in the first degree.

[4] The Court of Criminal Appeals' opinion recites dialogue of counsel and the Trial Judge and concludes "counsel for the defense did not know and could not say when Dr. Boehm would be available for the examination." Noted, however, is the fact the timing escaped the Court of Criminal Appeals. This exchange occurred BEFORE Dr. Boehm telephoned that same day and stated the examinations of Petitioner were scheduled. It was not that Dr. Boehm was "unavailable" but that in the short time involved, there was no time available to Dr. Boehm on his calendar or space open in the hospital.

At nine o'clock on the morning of March 12, 1969, a jury was empaneled over the objection of Petitioner, and the trial commenced. During the trial on March 12, 1969, Dr. Boehm telephoned counsel in the Judge's chambers during a recess and advised that arrangements had been made to make the preliminary tests on March 26, 1969 at his office, and on March 31, 1969 at Erlanger Hospital, these dates being the earliest the tests could be scheduled. The Trial Judge was informed of the schedule, and moreover, that once the results of the tests so scheduled were available, the Petitioner would be ready for trial. The trial continued without the Petitioner having the opportunity to undergo the tests.

Significantly, the tests were those which the Trial Judge had previously allowed by the order of March 4, 1969, presumably on good cause shown, and, as hereinafter shown, which he allowed by his post-trial order of March 24, 1969, eight days before trial and one day after trial, respectively, again on presumably good cause.

By the denial of an opportunity to procure the results of such tests, Petitioner was denied due process of law.[5]

Upon the trial, in the absence of the tests by Dr. Boehm, the only defense then available to Petitioner consisted of cross-examination of the State's witnesses as to Petitioner's incompetency at the time of the homicide resulting from massive brain cell damage due to prolonged involuntary and chronic alcoholism. The State's expert witness, Dr. William H. Tragle, acknowledged, on cross-examination, the scientific truthfulness of pneumoencephalographic

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[5] **Constitution of Tennessee, Art. 1, Sec. 9; Bacon v. State**, 215 Tenn. 268, 385 S.W.2d 107 as to materiality of witnesses; **Constitution of the United States, 6th Amendment; State v. Rossi**, 43 Atl. 2d 323 as to necessity of granting continuance.

tests and admitted he and the staff members of the Central State Hospital at Nashville, Tennessee, where Petitioner had previously been confined by order of the Court, were not equipped to make such a test of Petitioner and that none had been done. He readily admitted alcoholism was addictive and could be classified as involuntary.[6]

Without the benefit of the results of the tests by Dr. Boehm on Petitioner, the verdict of guilty of murder in the first degree was inescapable. Petitioner was denied his only witness. The sentence of imprisonment for 99 years undoubtedly resulted from a compromise with the death penalty due to the jury's observations of Petitioner's peculiar passiveness and a lack of comprehension during the trial.

Thereafter, as previously shown, one day after the conviction, an application was made on March 14, 1969 (App. 27a) to the Trial Judge for an order to permit the Sheriff to take Petitioner to the offices of Dr. Boehm on March 26, 1969 for the preliminary examination and to place him in Erlanger Hospital on March 31, 1969. The application was granted and on March 24, 1969 the Trial Judge entered such order (App. 28a).

On May 12, 1969, after intervening pleadings had been filed, the motion for a new trial was argued and denied (App. 17a-20a).

An appeal was timely perfected to the Court of Criminal Appeals of Tennessee and argued specially by advanced position on the calendar of that Court. On November 26,

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[6] Dr. Tragle agreed that alcoholism could progress to involuntariness and become compulsive, and that it was recognized in the medical profession that brain cell damage could result from chronic alcoholism.

1969 the Court of Criminal Appeals, Dwyer, J., entered an opinion affirming the conviction and sentence (App. 16a), and on December 3 and December 16, 1969 that Court denied a petition to rehear (App. 30a). A timely filed and detailed petition for a writ of certiorari was denied by the Supreme Court of Tennessee on April 13, 1970 (App. 1a). A petition to rehear was denied on May 4, 1970 (App. 31a).

QUESTIONS PRESENTED

The primary question presented, under the circumstances in this case, is whether in view of the order of the Trial Judge only eight days prior to trial to permit Petitioner to be tested as to brain damage suffered as a result of many years of chronic and involuntary alcoholism and his refusal to grant a short continuance to allow to be done that which his order allowed, was such an abuse of discretion as to irrevocably prejudice Petitioner, especially where one day after the trial and conviction, the Trial Judge again ordered Petitioner tested?

It is respectfully submitted that the denial by the Trial Court to grant a short postponement of the trial on March 12, 1969 to allow compliance with his previous order allowing the testing of Petitioner was, in these peculiar and technically potential circumstances, an abuse of discretion, especially when, after the trial he again ordered the Petitioner tested.

The reasons urged by Petitioner that this was a prejudicial abuse of discretion are more fully developed hereinafter under Authorities.

Inherently included is the basic question of the uncompromising position of the State of Tennessee in adhering to the more than a century old rule in *M'Naghten*, 8 Eng.

Rep. 718 (1843) and the refusal to acknowledge that the archaic rule of *M'Naghten* ignores the accepted advances in knowledge adopted in many jurisdictions.[7] The uncompromising and historical adherence to antiquity itself results, in 1970, in denial of due process.[8]

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[7] **U. S. v. John Edw. Smith**, 404 F.2d 270 (6 Cir., 1968) as the rule in the Federal Courts of Tennessee and as forecase in **Spurlock v. State**, 212 Tenn. 132, 368 S.W.2d 299 (1963) but seemingly never implemented. But see: **Baggett v. State**, 220 Tenn. 593, 596-597, 421 S.W.2d 629 (1967); D.C. Cir: **Durham v. U. S.**, 214 F.2d 862 and **McDonald v. U. S.**, 312 F.2d 847; 2nd Cir: **U. S. v. Freeman**, 357 F.2d 606 (1966); 3rd Cir: **U. S. v. Currens**, 290 F.2d 752 (1961); 4th Cir: **U. S. v. Chandler**, 393 F.2d 920 (1968); 6th Cir: **U. S. v. John Edw. Smith, supra**; 7th Cir: **U. S. v. Shapiro**, 383 F.2d 680 (1967); 8th Cir: **Pope v. U. S.**, 372 F.2d 710 (1967); and 10th Cir: **Wion v. U. S.**, 325 F.2d 420 (1963) cert. denied 377 U.S. 946 (1964).

[8] Stare decisis, in its honoring of precedent, perpetuates ignorance; as a result of the refusal of the State of Tennessee to acknowledge the advance in learning in the law comparable to the progress in science, justice is defeated. In every field but the law progress is unbelievable; since **M'Naghten** (1843) and **Dove v. State**, 50 Tenn. 348 (1871), the Wright brothers flew at Kitty Hawk, N. C., and since then scientists have perfected the space flights of man to and around the moon and back, while we in the law, by honoring stare decisis, view only that which can be seen in a rear-vision-mirror, studiously ignoring the present state of the law as requiring modernization in pace with knowledge. It is time, said former Mr. Justice Fortas, concurred in by Mr. Justice Douglas, in **Budd v. California**, decided October 17, 1966, for this Court to decide whether persons suffering from the illness of alcoholism and exhibiting its symptoms or effects may be punished criminally therefore, as in the case of narcotics addiction, citing **Robinson v. California**, 370 U.S. 660, 82 S. Ct. 1417 (1962). ** The question has great practical and social significance, citing Message of the President to Congress, March 1, 1966, proposing a program to attack the DISEASE OF ALCOHOLISM, 112 Cong. Rec. 4145, 4147. ** We do not impose punishment for involuntary conduct, whether the lack of volition results from "insanity", addiction to narcotics, or from other illnesses. Since **Robinson** in 1966, it has been scientifically unquestioned that alcoholism, practiced over a long period of time, is chronic and involuntary and at the same time irrevocably destroys brain cells with resulting inability to reason, or, as here, to have the faculty of possessing premeditation, the necessary prerequisite to being guilty of murder in the first degree. See: **Baggett v. State**, 220 Tenn. 593, 421 S.W.2d 629 (1968) for the partial relaxation of M'Naghten to the effect that recognition is afforded to the fact that an

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This Honorable Court needs grant the writ and consider the denial of due process to Petitioner caused by the patent abuse of discretion on the part of the Trial Judge in not granting, under these most exasperating circumstances, a short continuance in order to permit the examination of Petitioner, as previously ordered by the Trial Judge, in order to determine with scientific specificity if he was competent at the time of the homicide.

If, as Petitioner here contends, and as he contended in the Trial Court, the Court of Criminal Appeals of Tennessee and the Supreme Court of Tennessee, it was obvious that if as a result of a traumatic injury Petitioner had lost one-half of his brain, the State of Tennessee would not have charged him with murder in the first degree, not to mention convicting him, since it would have then been obvious he was so incompetent as to lack premeditation or the intent to commit the homicide. Does a destruction of the brain by other than traumatic injury, if proven, reach a different result?

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alcoholic may be involuntarily intoxicated and that such intoxication is an illness compatible with the definition of an "alcoholic" found in **Tennessee Code Annotated, §33-803**, and more particularly in §33-810 where, by statute it is said a chronic alcoholic is one who has "lost the power of self-control from the intemperate use of intoxicating liquors."

The Court of Criminal Appeals, in its opinion of November 26, 1969 hints that if the rule of M'Naghten is to be changed, it is a matter for the Legislature. The Court overlooked the fact that the M'Naghten Rule is court made and need not be changed by legislation, the court being capable of acknowledging its 1843 origin and scope based on the paucity of scientific knowledge then available and by decision abandon the "right and wrong" test of insanity.

Finally, the Court of Criminal Appeals appears to desire to change the law regarding insanity but believed itself bound by the decisions of the Supreme Court of Tennessee when it said "This is an intermediary court in the state system * * . We are bound by the rulings and holdings of the Supreme Court

(Continued on following page)

AUTHORITIES

In addition to the authorities hereinbefore cited for the propositions stated, the following are submitted:

(1) The necessity for and the materiality of the potential evidence of Dr. Boehm would have gone directly to either the innocence of Petitioner by reason of insanity, or to the degree of guilt. The proof of the use of a deadly weapon, presumably by one who is mentally competent, is sufficient only to sustain a charge of second degree murder, unless it is rebutted by other facts and circumstances. *Gann v. State*, 214 Tenn. 711, 383 S.W.2d (1963); citing *Bostick v. State*, 210 Tenn. 260, 360 S.W. 2d 472 (1962) and *Smith v. State*, 212 Tenn. 510, 370 S.W.2d 543 (1963).

(2) The denial of the continuance in the circumstances of this case was error. The number of cases considering whether or not a trial judge abused his discretion when denying a continuance evidences not only that the question exists but supposes that if there be such a rule then in certain cases and under certain circumstances a denial of a reasonable continuance could and would be an abuse of discretion, hence error. The most recent announcement that there is existing in Tennessee law the possibility of abuse of such discretion is found in *Oden v. State*, 453 S.W.2d 441, decided by the Court of Criminal Appeals,

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of our State." citing **Spurlock v. State**, 212 Tenn. 132, 368 S.W.2d 299 to the effect that " * * Until a definitely superior rule of law is presented and enacted by the Legislature, perhaps Tennessee will, in the words of **Anderson** [Andersen] **v. U. S.**, 9 Cir., 23 F.2d 113, 'trudge along the now well-traveled pike blazed more than a century ago by M'Naghten.' "

certiorari denied by the Supreme Court of Tennessee on April 6, 1970, wherein, at page 444 the Court said:

> "[citing *Moorhead v. State*, 219 Tenn. 271, 409 S.W. 2d 357 concerning granting or denying a continuance]. So far as we can find, it has always been the rule in this State that a trial judge will not be put in error for denying a continuance unless it is shown that he has abused his discretion in doing so. * * *. This Court has held though that it will not disturb the exercise of this discretion by the trial judge UNLESS something is developed in after trial to show that the defendant *might have been prejudiced in some way* by the refusal to grant a continuance." (Caps supplied for emphasis, and italics supplied for particular emphasis).

Goodman v. State, 19 Tenn. 195 (1838); *Jones v. State*, 78 Tenn. 585 (1882); *Sevier v. State*, 1 Tenn. (Shannon) 129 (1859); *Crossway v. State*, 157 Tenn. 363; the potential testimony of Dr. Boehm had the possibility of substantially affecting the result of the trial. *Lockhart v. U. S.*, (6 Cir. 1920) 264 F.14, cert. denied 41 S. Ct. 14, 254 U.S. 645, 65 L. Ed. 455; each case needs be judged on its peculiar facts. *Johnson v. State*, 213 Tenn. 55, 372 S.W.2d 192; time to prepare his defense is essential, *State v. Poe*, 76 Tenn. 647, 654; it is equally essential to permit a defendant to present his evidence. *Saunders v. Shaw*, 244 U.S. 317, 319, 37 S. Ct. 638, 639, 61 L. Ed. 1163 (1917); *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

The short delay sought and denied here was error and denied Petitioner the only defense available and which became possible but very shortly before trial. *Sykes v. Com. of Va., ex rel Peyton*, 86 S. Ct. 1507, 384 U.S. 333, 16 L. Ed. 2d 600 (1966). Here, as in *U. S. v. Ellenbogen*, 365 F.2d 982, cert. denied 87 S. Ct. 892,

386 U.S. 923, 17 L. Ed. 2d 795, the myopic insistence of the Trial Judge upon expeditiousness in the face of the justifiable request for a short continuance to do that which the Trial Judge had previously ordered done, rendered Petitioner's right to present his evidence an empty formality. The denial here of the short continuance requested, under these special circumstances, was so arbitrary as to violate due process of law and hence error most prejudicial to Petitioner. *U. S. ex rel Bronzell v. Rundle*, 294 F. Supp. 1338, affirmed 410 F.2d 371.

It is the duty of an appellate court to reverse such a denial of continuance where the denial denied a fair opportunity for preparation and therefore a fair trial. Petitioner fully acquainted the Trial Judge not only of the substance of the expected testimony but clearly showed its direct materiality to the defense of Petitioner. *21 Am. Jur. 2d, Crim. Law, Sec. 237; 12 Am. Jur. 2d, Continuance, Sections 31 and 32.*

(3) The "right and wrong" test of M'Naghten, modified elsewhere through Tennessee to conform to current knowledge of medicine and psychiatry, works a grievous wrong and denies due process of law in Tennessee so long as Tennessee refused to accept the advances of learning in the past 127 years. The permission given by this Honorable Court in *Leland v. Oregon*, 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 to the states to abandon M'Naghten's Rule is insufficient and illusory if any advance in law was contemplated. Compulsion by direction seems more necessary in 1970. Criminal Law—Responsibility—Insanity as a Defense, *36 Tenn. L. Rev. 809* as a basis for a present day reconsideration of *Gibbs v. State*, 192 Tenn. 529; *Wilcox v. State*, 94 Tenn. 106; *Spurlock v. State*, 212 Tenn. 132 in the light of expanding scientific knowledge regarding the continued application of M'Naghten's Rule.

In *22 C.J.S., Crim. Law*, §70, it is said that while temporary insanity or frenzy resulting from voluntary intoxication affords no defense except that it may be sufficient to deprive the accused of the capacity to entertain the specific intent essential to the commission of a particular crime, and that insanity, induced by alcohol, even if voluntarily taken may afford a valid defense. Thus long continued habits of intemperance producing pormanent mental disease amounting to insanity, or so weakening and impairing the mind that one committing an offense has not mind enough at the time to know right from wrong, relieves him from responsibility under the law, the same as insanity arising from other causes. An accused in such a condition cannot possess the necessary requisites to be convicted of murder in the first degree.

CONCLUSION

Under the circumstances it was error to deny the request for a short continuance. This error deprives the Petitioner of the only evidence possible in his defense.

Similarly, it was error when the state appellate courts affirmed Petitioner's conviction of murder in the first degree.

Even if it was not error to deny the continuance, it was error when Petitioner was convicted of murder in the first degree instead of murder in a lesser degree.

It has been error for some time in Tennessee, and assuredly is error in 1970, considering the advances in knowledge since 1843, to continue to apply the "right and wrong" test of M'Naghten.

RELIEF

It is respectfully submitted that this Honorable Court, upon a review of the facts and the applicable law, should grant the petition for the writ of certiorari to the Supreme Court of Tennessee, and summarily reverse the conviction of Petitioner.

Respectfully submitted,

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Attorney for Petitioner.

POST CARD NOTICE OF DENIAL OF CERTIORARI BY THE SUPREME COURT OF TENNESSEE

—Office of—
CLERK OF SUPREME COURT
Knoxville, Tenn.

MAR 16 1970 19...

Dear Sir:

In the cause of Wilburn E. Smith vs.

The State ..... the Supreme Court today

..... the judgment of the Lower Court

WRIT DENIED

.....

Yours truly,
JOHN A. PARKER, Clerk

THE COURT OF CRIMINAL APPEALS OF TENNESSEE, JACKSON

WILBURN E. SMITH
Plaintiff in Error

v.

STATE OF TENNESSEE
Defendant in Error

NO. 147
Hamilton County
Hon. Campbell Carden, Judge

OPINION OF THE COURT OF CRIMINAL APPEALS OF TENNESSEE

(Filed November 26, 1969)

For Plaintiff in Error:

H. H. Gearinger
Professional Building
Chattanooga, Tennessee

For Defendant in Error:

David M. Pack
Attorney General
of Tennessee

Arnold Peebles, Jr.
Assistant Attorney General
Nashville, Tennessee

Jerry Foster
Assistant Attorney General
Chattanooga, Tennessee

AFFIRMED

Robert K. Dwyer
Judge

OPINION

Wilburn E. Smith appeals from a conviction of murder in the first degree with a resulting sentence of confinement for ninety-nine years in the State Penitentiary. This verdict, as found, was returned by a jury in the Criminal Court of Hamilton County.

Defendant attacks the validity of the judgment entered against him and files assignments of error.

These errors are summarized:

1. The Court erred in not granting the defendant a continuance in order for him to be examined by a doctor of defendant's choice.

2. The Court erred in not submitting special requests tendered to the jury and denying motion for special findings and verdict by the jury.

3. The Court erred in approving the verdict of the jury in that it is contrary to the law and contrary to the weight and preponderance of the evidence.

To evaluate the assignments of error a recitation of the facts is a necessity.

The defendant, Wilburn E. Smith, on the 23rd day of September, 1967, entered the home of his former father-in-law and shot and killed the husband of his ex-wife.

[fol. 2] The homicide occurred in the living room of Howard Roy Morgan, who resides in the Falling Water community of Hamilton County. Mr. Morgan, along with his son, daughter and the deceased, were watching television when the defendant entered the home and started firing a 22-automatic rifle at the deceased, who was sitting on the couch. Eight shots struck the de-

ceased with one entering the chest area, causing death. The elder Mr. Morgan and his son grabbed the rifle and a struggle ensued, which resulted in their obtaining possession of the weapon. During the struggle the defendant related to the elder Morgan that he was not going to hurt either one of them. He further related to Mr. Morgan, "Well, it looks like you have always wanted to kill me." He testified that he had known the defendant since he was a strip of a boy and through the years when he had been married to his daughter. He related that he had smelled the odor of alcohol on the defendant's breath when they were wrestling for control of the weapon but that he was not drunk. He related that defendant had been by the home earlier, around 6:30 p.m., to see his children and that defendant was not intoxicated but had been drinking. His son, Eugene, relates in substance as his father testified. He stated that during the struggle for the weapon his sister, defendant's ex-wife, came into the room and defendant stated, "D-a-m, you're next." He also relates that defendant said to them that "he didn't come there to hurt them." He stated defendant was there earlier in the evening and had not been drinking. He related he had known the defendant through the years and had seen him drunk and sober and had smelled odor of alcohol
[fol. 3] on defendant when they were struggling for the gun, but that defendant was not drunk. The defendant's daughter testified she was in a back room of the house with her mother when she heard the shots, ran into the living room, saw her daddy had shot her step-daddy, and ran out of the house to a neighbor's house. She relates that her father came into the neighbor's house and she heard him tell the neighbor, "I told you I was going to get him." Mrs. Joyce Hankins Sparks, defendant's ex-wife, testified she heard the shots, ran into the living

room, and saw that her husband had been shot. The defendant was struggling with her father and brother when he made the statement to her, "You're next." She related defendant had been drinking. She could tell by his eyes. She further related that as a result of this shooting, her sister, who had been in the living room at the time, was now a mental patient. She relates that defendant had previously struck her one time when she was in the hospital and had cut up a coat her mother had given her. Mr. Grady Perry, the neighbor, testified that the defendant entered his home and stated, "I've shot Frank. Do you care if I stay here 'til the law comes?" He related that he had known defendant all of his life and had been drunk with him. His observation of the defendant was that he talked all right, walked nice and could not say whether he was drunk or not; and, that defendant had asked him for a drink of water and if he could turn down the television and turn the lights off. The deputies who responded to the call testified that defendant met them when they pulled into the area of the shooting; that defendant told them he had shot Frank Hankins, had shot him pretty bad, five or six times; and, that [fol. 4] he had had it on his mind. They both testified defendant was not drunk. One related he had arrested defendant before for being drunk, and that defendant on this occasion stated, "Ask me anything you want," (in reference to the killing). The chief of detectives testified that he talked to the defendant on the evening in question and he could smell the odor of alcohol on his breath, but that the defendant talked all right and walked all right.

The defendant testified and, in substance, recounted his past life. He talked of the two marriages to his ex-wife; that he had been drinking since he was fifteen years

old and could not stop, although he had tried; that he had been hospitalized because of drinking; and, that he had suffered a blow about his head which caused him to have headaches. When he would visit his three children they would not be properly clad and seemed to be hungry; that when he would go to see the children, the deceased would sit on the couch sharpening a big knife. Prior to the shooting he had been on a drinking spree for three days and all he remembered was his former father-in-law shaking him and telling him he had shot Frank; that the rifle belonged to his brother-in-law, Eugene Horne, with whom he lived; that he remembers going to jail and being charged with first degree murder and talking to the chief of detectives; that since he had been in jail he had been sent to Central State Psychiatric Hospital and examined by doctors; and, that when his ex-wife remarried it hurt him to see another man have his children. He also testified that he hired an attorney the day after he shot Frank Hankins. The defendant called Vernon Miranda,

[fol. 5] who testified he had been on leave from the Army and he and defendant had been drinking together three days prior to the shooting. The last time he had seen the defendant was around 4:00 p.m. on the date of the homicide and defendant was intoxicated, but knew what he was doing. Another witness, Eugene Horne, brother-in-law of defendant, testified defendant had been living with him and that defendant had drinking problems. He stated that he had, on one occasion, taken him to a hospital because of his drinking and that the rifle belonged to him and his son had told him that Wilburn had gotten it from off the wall the day of the homicide. He had seen defendant about 5:00 p.m. on the 23rd day of September and the defendant was drinking at that time. Defendant, on a prior occasion, had told him about his children not

having the things they should. A sister of defendant testified that defendant had been a drunk since he was fifteen years old, and that he had been hospitalized one time because of drinking. Another sister testified that defendant had had a drinking problem since he was fifteen years of age. A nephew testified that he had seen the defendant on the day of the homicide come into his father's house and get the rifle off the wall; that he had seen his uncle (defendant) in the house at 8:00 o'clock in the morning on the 23rd day of September and that he was drunk; that defendant got the rifle around 8:00 p.m. and that he was drunk and staggering; that he saw defendant drive off spinning, almost hitting a tree; and, that it was ten miles from his home to the Morgan residence, scene of the homicide.

[fol. 6] The State, in rebuttal, called Dr. William H. Tragle, a psychiatrist, Superintendent of Central State Psychiatric Hospital, who testified that defendant was in the hospital under observation by the staff for a month; that it was his opinion and the staff's opinion that at the time they observed the defendant he was not suffering from any form of insanity; and, that in his opinion there was nothing to indicate from their examination that the defendant did not know right from wrong when he committed the offense on September 23, 1967. On cross-examination, in response to questions about prolonged drinking and the resulting damage to cells in the brain, the doctor testified that the only positive way of determining such damage, in his opinion, would be the microscopic examination of the brain. They were familiar with the reports of the hospital in Florida in which the defendant had been a patient because of drinking. He was asked if defendant had been given a pneumoencephalographic test (spinal fluid taken from the cavities of the brain into which

air is injected which then casts a shadow on the X-ray film, which characteristics of the sizes and shapes of the shadowed cavities are then studied and certain inferences may be drawn as to damage, tumors, etc.). The doctor was of the opinion that this test was not necessary; that their examination, which included an electroencephalograph, (an apparatus for detecting and recording brain waves) did not indicate any damage to that part of the brain which we use to think; that because of this test, they did not feel that a pneumoencephalograph test was called for; and, that they did not find sufficient clinical reason [fol. 7] to think that defendant's brain had suffered any damage from drinking. He further related on cross-examination that he would not have made any more extensive examination of the defendant if he had been hired as a private psychiatrist to examine defendant. The defendant entered a special plea of temporary insanity or insanity at the time of the commission of the offense. He did not call and offered no expert medical witnesses.

Defendant assigns as error that the Court erred in not granting him a continuance in order to allow a Dr. Boehm to examine the defendant. The record reveals that the homicide occurred on the 23rd day of September, 1967. The indictment was returned on November 22, 1967. The defendant testified that he hired an attorney the day after the shooting; that several continuances of the case had been asked for and granted by prior privately retained counsel in the case; and, that present privately retained counsel entered and undertook the defense six months prior to the trial date, March 12, 1969. The record reflects that the Court had granted a continuance in February in order for the defendant to assemble expert scientific witnesses to testify for the defense. The record further reveals that the Court had reassigned, on motion of the

defense, the case for trial March 12, 1969. On March 4, 1969, on motion of the defendant, the Court entered an order for the defendant to be examined by a Dr. Boehm, neurosurgeon, practicing in the City of Chattanooga. On the date of trial the defendant, not in accordance with the rules of Court, moved the Court again for a
[fol. 8] continuance based on the unavailability of Dr. Boehm. The following took place between the Court and defense counsel at that time as to why the examination had not been performed in the time the order was entered and the day of trial:

"MR. GEARINGER: We don't have much alternative, Your Honor. But what I'm saying is that my conscience will be weighed, that if Dr. Walter Boehm, and I must take some disagreement with Your Honor's statement. Dr. Walter Bochm believes in this scientific proof. The question yet to be resolved is, on the basis of his skill and knowledge, does he find any mental defect. He agrees it's possible. He agrees that these tests are scientifically provable, but the point is that he has agreed to do it, is willing to do it, wants to do it, but has not yet done it.

"THE COURT: Why hasn't he done it, since we reassigned this case last month for that very purpose?

"MR. GEARINGER: That's right, Your Honor.

"THE COURT: And Dr. Boehm does not run this court.

"MR. GEARINGER: I know he doesn't.

"THE COURT: So why, if he's so interested in it, why hasn't he arranged to have this done?

"MR. GEARINGER: Your Honor, that I don't know. But I do know that each day when I call, I get answer-

ing service, or I get the word, 'He's in surgery.' Now, I have this same difficulty, and I'm sure Your Honor remembers when you were down here in this spot and not on the bench, in damage suits, of getting doctors in here. I don't like doctors to run our courts either, but I don't know how to get Dr. Boehm to do that which he has agreed to do, except when he can do it."

In the exchange it is apparent that counsel for the defense did not know and could not say when Dr. Boehm would be available to make the examination.

[fol. 9] The prior order entered in February, when the case was reassigned to March 12, 1969, was to give defendant an opportunity to amass expert medical witnesses. It is apparent from a review of this record that the defense attorney did not and could not say when the doctor would conduct the tests. In view of the many continuances and the amount of time from the date of the offense to the trial a total of eighteen months had elapsed.

It is elementary that a motion for a continuance is addressed to the sole discretion of the trial judge, and that his judgment will not be disturbed in the absence of a clear showing of prejudicial abuse of his discretion. *Bass v. State*, 191 Tenn. 259, 231 S.W.2d 707. There is no clear showing in this record that the defense was prejudiced by the Court not continuing this case again, especially in view of Dr. William H. Tragle's testimony that the electroencephalographic test showed no damage to the area of the brain of the defendant which we use to think.

In defendant's motion for a new trial he alleged tests have, subsequent to the trial, been performed by Dr. Boehm. There is no showing by affidavit or otherwise

that any test performed by Dr. Boehm would be any other evidence than contradictory or impeaching of Dr. William Traglo. In fact, there is a complete lack of showing that any test or examination of the accused subsequent to the trial would have affected in any manner the Court's ruling on the question of defendant's criminal responsibility. We find no abuse by the Court in its action in denying defendant's motion for a continuance. The assignment is overruled.

[fol. 10] Defendant assigns as error the insufficiency of the evidence to sustain the verdict and that it is contrary to the law. A review of the record reflects there is a sufficiency of evidence in the record to sustain the verdict of the jury and the verdict, as returned by the jury, is supported by the law. In this record there is found that the defendant had a previously-formed design to kill, as evidenced by the defendant obtaining the rifle some ten miles removed from the scene of the killing, driving over to the home of the deceased; entering, firing the rifle, hitting deceased eight times, stating during the struggle over the rifle to his ex-wife, "You're next," also stating to the former father-in-law and his son during this struggle for possession of the rifle that "he didn't come there to hurt them," then going next door stating, "I told you I was going to get him," and telling the arresting officers he shot Hankins pretty bad. These are some of the proven facts in this record which show that defendant had a previously-formed design to kill Hankins. It also shows that at the time of the killing he was not intoxicated to the extent that he was unaware of what he was doing; in fact, they show a complete awareness of what he was doing. The verdict of the jury has resolved adversely to defendant his contentions of fact that he was intoxicated at the time of the killing. The verdict of the jury has re-

solved adversely to the defendant his contention that he did not remember anything about the slaying because of his having been on a drinking spree for three days. There is a complete absence of proof in this record that defendant's use of intoxicants through the years has caused a condition of settled insanity to exist.

[fol. 11]

In fact, the witnesses called by the defense, his relatives, refute the fact that defendant was incapable of distinguishing between right and wrong. They relate he was and had been hospitalized on an occasion because of drinking. They also relate he had and was capable of making his way. He had expressed a dislike of the prevailing conditions his children were in by being in the home of the deceased. Defendant's use of intoxicants, as evidenced in this record, does not and could not prevail to excuse him from his criminal responsibility in committing this crime. To hold otherwise would permit organized, orderly society to be at the mercy and whims of persons who voluntarily drink and then when they commit a crime, to excuse them on the premises that they had a habit they could not or would not control or that they did not remember, when all the evidence in the case clearly showed that the defendant was not drunk and was completely aware of what he was doing and what he had done. The theory of the defense in this case is (1) the defendant was drunk and did not know what he was doing; and (2) his use of intoxicants *might have damaged* his brain to some extent, which would not make him criminally responsible. In *Atkins v. State*, 119 Tenn. 458, 105 S.W. 353, we adopt herein the language of Mr. Justice Crabbe, quoted in that opinion:

> "... The history of criminals and criminal trials shows that he who has not learned betimes to restrain the evil inclinations of our nature—envy, malice, revenge, and

their kindred passions—but has a sufficiency of moral sense left to deter him from the commission of enormity while sober, will often 'screw his courage to the sticking point' by the free use of ardent spirits, and, [fol. 12] thus made able to silence the twinges of his conscience, will voluntarily imitate the demon. But let courts once approve the doctrine now contended for, and it will not be resorted to as a plea by persons of this description alone; but even the cold-blooded calculating assassin will never be a sober homicide. He will always exhibit himself at the bar of a court of justice as a specimen of insanity produced by drunkenness. And thus this degrading and disgraceful, yet too common, vice; instead of being hunted from society as the bane of good morals and social and domestic happiness, will be converted into a shield to protect from punishment the worst of crimes. All civilized governments must punish the culprit who relies on so untenable a defense; and in doing so they preach a louder lesson of morality to all those who are addicted to intoxication, and to parents and to guardians, and to youth and society, than 'comes in the cold abstract from pulpits.'

"In order to be clearly understood, we have supposed the strongest case—a case of entire prostration of intellect immediately occasioned by drunkenness—and have said that that constitutes no excuse. Instances, however, of heinous offenses, committed under such circumstances, are believed to be of rare occurrence. They are much oftener the result of that midway state of intoxication which, although sufficient to stimulate the evil-disposed to actions correspondent with their feelings, would not excite the good man to criminal deeds. It is generally the drunken man acting out the

sober man's intent. He says and does when drunk what he thinks when sober."

All factual questions are and were resolved by the jury in this case. We will not interfere or interpose our judgment into this province. The failure of the defendant to remember is, in itself, no proof of his mental condition when the crime was committed. *Thomas v. State*, 201 Tenn. 645, 301 S.W.2d 358.

[fol. 13] The verdict concludes the jury found premeditation the necessary element for first degree murder to be present in this record. In *Clarke v. State*, 218 Tenn. 259, 402 S.W.2d 863, may be found the following language:

"Whether premeditation is present in a given case is a *question of fact to be determined by the jury from all the circumstances of the case*, such as the use of a deadly weapon upon an unarmed victim. * * *" (emphasis added)

In *Edwards v. State*, 221 Tenn. 60, 424 S.W.2d 783, 785, our Supreme Court had this to say:

"... This Court has many times held that the elements of premeditation and deliberation may be inferred from the circumstances of the killing. In Bass v. State (1950) 191 Tenn. 259, 231 S.W.2d 707, the Court said:

"'Both premeditation and deliberation may be inferred from the circumstances of a homicide. While wilful killing with a deadly weapon is not a sufficient basis for an inference of premeditation and deliberation, it is seldom that the evidence in a case of homicide is restricted to no more than these bare facts and it is commonly the case that

> the jurors have before them other circumstances from which they may infer the existence or the want of the mental elements of premeditation and deliberation.'"

We, therefore, find the verdict of the jury is not contrary to the law. Therefore, defendant's assignments as to the sufficiency of the evidence and the verdict being contrary to the law are accordingly overruled.

Defendant next contends that this Court should set aside and discard the M'Naghten rule (right and wrong) announced
[fol. 14] 126 years ago and adhered to in this State for nearly one hundred years, beginning with *Dave v. State*, 50 Tenn. 348. Defendant urges this Court to set aside the M'Naghten rule for more *enlightened measures*. He urges this Court to adopt holdings in *United States v. John Edward Smith, Jr.*, 404 F.2d 270 (6th Cir.) wherein the Court adopted the American Law Institute's test of criminal responsibility. The test or charge to be submitted and sought to be brought into our law by the defendant is enumerated on page 727 of *United States v. John Edward Smith, Jr., supra*.

This is an intermediary court in the state system as comparable to the Sixth Circuit being in that capacity in our Federal system of courts. In *United States v. John Edward Smith, Jr., supra*, the following language is to be found:

> "A Supreme Court holding directly in point on the issue of criminal responsibility would, of course, foreclose our consideration of any alternative."

We are bound by the rulings and holdings of the Supreme Court of our State. In *Spurlock v. State*, 212 Tenn. 132, S.W.2d 299, the following language may be found:

" . . . Until a definitely superior rule of law is presented and enacted by the Legislature, perhaps Tennessee will, in the words of Anderson [Andersen] v. United States, [9 Cir.], 237 F.2d 118, 'trudge along the now well-traveled pike blazed more than a century ago by M'-Naghten.' "

The assignment of error is accordingly overruled. The charges, as requested by the defendant and re-
[fol. 15] fused by the trial court, in view of this Court's action in overruling the defendant's last assignment of error, are therefore found to be without merit.

It, therefore, follows that all assignments of error being found wanting, it is the judgment of this Court that the judgment entered against the defendant in the trial court is affirmed.

/s/ Robert K. Dwyer
Robert K. Dwyer

Concur:

/s/ William S. Russell
William S. Russell

/s/ John A. Mitchell
John A. Mitchell

Docket Entries

[Caption Omitted]

AFFIDAVIT CONCERNING DOCKET ENTRIES

AFFIDAVIT:

STATE OF TENNESSEE :
COUNTY OF HAMILTON:

I, H. H. GEARINGER, Attorney for the above-captioned Petitioner, after being duly sworn according to law, depose and say that the following is a true copy of the Minute Entries of the First Division of the Criminal Court of Hamilton County, Tennessee in this case.

"112725 Wilburn E. Smith, Race: W, Age: 31, Sex: M
MURDER Lower Court: Sessions
Arresting Officer: Nelson
Bond: (None)

Dates	Actions
11/22/67	Indictment or presentation filed in First Division Criminal Court
11/22/67	8 subpoenas issued for state witnesses, ex., sheriff
11/27/67	Continued to Dec. 4, 1967 arraignment #1
12/4/67	Continued to Dec. 18, 1967 on motion of atty.
12/18/67	Plea of not guilty set for March 7, 1968 #1
2/28/68	Motion to take deposition for proof filed Motion for continuance filed 1 duc tec spa iss Ex. Newell, Shf.

Docket Entries

3/4/68	Motion to take deposition overruled #1
	Motion for continuance sustained #1
	Assignment cancelled—place on March 11th 2:00 p.m. docket
	Question whether deft. should be examined at Central State Hosp. #1
3/11/68	Continued to March 18th 2:00 p.m. #1
3/18/68	Continued to March 25th 2:00 p.m. #1, [attorney did not appear]
3/25/68	Continued to March 27th #1
3/27/68	Continued to April 1st 10:00 a.m. #1
4/1/68	Continued to April 8th #1
4/8/68	Affidavit of Gus A. Wood, III, filed
	Defendant ordered committed to Central State Hospital for examination, etc.
	Copy of judgment in file.
6/12/68	Report received from Central State Hospital
	Order entered directing sheriff to return deft. to Hamilton County, jail, #1
	Order in; order ex. Newell
6/17/68	Continued to June 24th #1
	Arraignment—(Notify attorney)
6/24/68	Set for trial on Nov, 7th #1
10/25/68	Motion for order relieving Gus Wood, III, and substituting H. H. Gearinger's name as atty. of record—Filed and copy in.
10/28/68	Reassigned for Feb. 26, 1969 from Nov. 7th #1
	Motion sustained #1
1/2/69	Motion to change plea filed—copy iss.
1/3/69	Motion for copy of statements, etc., filed
	Motion to require state to elect whether they intend to seek death penalty filed—copy in
	Motion for copy of autopsy report filed—copy in

Docket Entries

1/6/69	Motion to change plea sustained. Attorney to file proper pleadings #1
1/10/69	Plea of not guilty heretofore changed to not guilty by reason of temporary insanity filed
1/13/69	Motion #1 sustained within code limits #1 Motion #2 overruled #1 Motion #3 overruled #1
2/17/69	Motion to cancel assignment and reassigned filed
2/18/69	Supplemental motion to cancel assignment filed
2/24/69	Motion to cancel assignment and reassigned sustained Supp. motion to cancel assignment sustained Case assigned to March 12, 1969 #1
3/4/69	Ordered that sheriff transport defendant to office of Dr. Walter E. Boehm for examination #1
3/10/69	Motion to cancel assignment filed
3/12/69	Motion to cancel assignment ordered stricken as not filed within limits of court rules #1 Jury respited until March 13, 1969 at 9:00 a.m.
3/13/69	Jury verdict of guilty of murder in first degree, jury polled - agree on verdict - penalty of 99 years - 40 days to file motion for new trial - at conclusion of all testimony, extra juror, Steve McAfee was excused, thereafter arguments of counsel and charge of court were presented to jury #1
3/14/69	Motion for completion of medical examination filed
3/24/69	Motion sustained and order signed #1 Formal order entered sustaining said motion #1

Docket Entries

3/26/69	Post conviction memo filed
4/14/69	Motion for additional time filed - copy in
4/21/69	10 additional days allowed to file motion for new trial #1
4/25/69	Motion for new trial filed and copy in Motion to pass hearing on defendant's motion for new trial until counsel obtains transcript and files an amended motion filed and copy in
4/29/69	Proffer in support of motion for new trial filed
5/2/69	Amended motion for new trial filed and copy iss.
5/5/69	Motion for new trial continued to May 12, 1969
5/12/69	Motion for new trial overruled - 90 days allowed to perfect appeal - no bond #1
5/15/69	Bill of exceptions filed
5/19/69	Record forwarded to Court of Criminal Appeals
11/26/69	Procedendo from Court of Criminal Appeals filed Judgment affirmed
12/18/69	Decree from Court of Criminal Appeals denying petition to rehear filed
4/13/69	Decree from Supreme Court filed - writ of certiorari denied"

/s/ H. H. Gearinger
Attorney for Petitioner

Subscribed and sworn to before me, this 2 day of July, 1970.

...../s/.....
Notary Public
My Commission Expires:

COPY OF LETTER FROM THE SUPREME COURT OF THE UNITED STATES DATED MAY 22, 1970

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

May 22, 1970

H. H. Gearinger, Esquire
Suite 101 Professional Building
Chattanooga, Tennessee 37402

Re: Wilburn E. Smith v. Tennessee

Dear Mr. Gearinger:

I return your application for an extension of time for the reason that the 90-day period will not expire until August 2, 1970, and any request for additional time at present would appear premature.

Very truly yours,

John F. Davis, Clerk

By: /s/ Edward C. Schade
E. C. Schade
Assistant

ECS:lsr

Enclosure

COPY OF INDICTMENT

NO. 113725

A TRUE BILL

/s/ M. C. Gross
Foreman of the Grand Jury

Charge:

MURDER

STATE OF TENNESSEE

v.

Wilburn E. Smith

STATE OF TENNESSEE, HAMILTON COUNTY

Criminal Court November Term, 1967

THE GRAND JURORS for the State aforesaid, being duly summoned, elected, impaneled, sworn and charged to inquire for the body of the County aforesaid, upon their oaths present:

That Wilburn E. Smith heretofore on the 23rd day of September, 1967, in the County aforesaid, did unlawfully, feloniously, wilfully, deliberately, maliciously, premeditatedly and of malice aforethought assault, kill and murder Frank Hankins, against the peace and dignity of the State.

/s/ Edward E. Davis,
Attorney General

COPY OF NEWSPAPER ITEM CONCERNING DR. KNISLEY'S ANNOUNCEMENT CONCERNING BRAIN CELL DAMAGE BY ALCOHOLISM, DATED FEBRUARY 2, 1969

ALCOHOL N.G. Although it's long been held that excessive drinking damages the brain, a new report contends that even "moderate social drinking" destroys brain cells.

According to Dr. Melvin H. Knisely, professor of anatomy at the Medical College of South Carolina, even a little alcohol is not little enough. In his report to the 28th International Congress on Alcohol and Alcoholism he offered evidence to show that when a drinker begins to feel giddy, a few of his brain cells are being killed. And, in extension of this, a heavy drinking bout can damage or destroy as many as 10,000 such cells.

ORDER DATED MARCH 4, 1969 ALLOWING THE EXAMINATION OF THE PETITIONER

STATE OF TENNESSEE Vs. WILBURN E. SMITH	NO. 113725 In the Criminal Court of Hamilton County, Tennessee First Division

ORDER

On the motion of the defendant, by counsel, and for good cause to the Court shown, it is

Order

ORDERED that the defendant, Wilburn E. Smith, confined in the Hamilton County Jail without bond awaiting trial for murder, be made available upon notice given the Sheriff for transportation to the offices of Dr. Walter E. Boehm, 1010 East 3rd Street, Chattanooga, Tennessee or such other place as Dr. Boehm may designate for the purpose of examination and testing for such a period of time as is necessary; or until Dr. Boehm can advise counsel of the findings; provided further, that at all times the said defendant be held in security in a proper place if it be necessary to retain him away from the Hamilton County Jail over a night or nights; and that upon the completion of said examination and testing the defendant be returned to the custody of the Sheriff at the Hamilton County Jail.

Enter this the 4 day of March, 1969.

/s/
.....
Campbell Carden, Judge

Approved:

/s/ H. H. Gearinger 3/4/69
H. H. Gearinger,
Attorney for Defendant

.....
Jerry Foster, Assistant
District Attorney General

COPY OF MOTION TO CANCEL TRIAL SET FOR MARCH 12, 1969 SO AS TO ALLOW EXAMINATION OF PETITIONER

STATE OF TENNESSEE Vs. WILBURN E. SMITH	No. 113725 In the Criminal Court of Hamilton County, Tennessee First Division

MOTION

Comes the defendant, by counsel, H. H. Gearinger, and putting himself upon the Court because of the hereinafter recited circumstances, respectfully moves the Court cancel the trial of this case set for March 12, 1969 and re-set it upon a date convenient with the Court, and for reason recites and advances the following:

1. An order was heretofore entered cancelling the trial of this case upon February 26, 1969 and resetting it for March 12, 1969 for good cause to the Court shown and more fully detailed hereinafter;

2. Thereafter, an order was entered permitting the taking of defendant, Wilburn E. Smith, from the Hamilton County Jail for examination and testing by Dr. Walter Boehm;

3. As of this date, noon of March 10, 1969, Dr. Boehm has not had an opportunity to do the testing necessary to the defense of Smith, and as of noon this date Dr. Boehm is in surgery and unreachable.

4. As has been made fully known to the State there is present here but a single question, that is, as to the competency of Smith. Professional medical data has been furnished the State and acknowledgment made that there

will be no defense made regarding the shooting but that the defense will rely only on the plea heretofore entered going to the intent of Smith on the day of the charged offense.

5. The tests to be made by Dr. Walter Boehm go to questions raised by the *M'Naghten Rule* (1843); [fol. 2] *Commonwealth v. Rogers*, (1844); *Durham v. U. S.*, (1954): Sobeloff "Insanity and the Criminal Law: From M'Naghten to Durham, and Beyond" (1955); *Pollard v. U. S.*, (1960); *U. S. v. Currens*, (1961); ALI Model Penal Code, Sec. 4.01 (1962); *U. S. v. Freeman*, (1966); *U. S. v. Shapiro*, (1967); *U. S. v. Chandler*, (1968); *U. S. v. John E. Smith*, U. S. Ct. of Appeals for the 6th Cir., decided Nov. 25, 1968; *Powell v. Texas*, (1968) and "Driver to Easter to Powell: Recognition of the Defense of Involuntary Intoxication?" 22 Rutgers L. Rev. 103 (1967).

6. It is fully appreciated by the defense, and fully communicated to the State, that Dr. Boehm's tests and reports are vital to the defense.

7. It is also appreciated that the State could not voluntarily agree to the attached proposed Order marked Exh. "A" to this motion, hence it the seeking of justice this motion is filed.

8. It is suggested that the defense proposed is new in the law of Tennessee; that its preparation is complex; that the preparation is fully dependent upon Dr. Walter Boehm and that his professional schedule and commitments are beyond the control of the defendant or counsel.

9. As indicated by Exh. "A" hereto the defense is not only willing but anxious to try this case at the earliest date possible under Dr. Boehm's reports and that all that is

here asked is the minimal time required to get those tests performed.

2:00 p.m.

/s/ H. H. Gearinger 3/10/69
H. H. Gearinger
Attorney for Defendant

APPLICATION FOR AN ORDER DATED MARCH 14, 1969 TO PERMIT EXAMINATION OF PETITIONER SUBSEQUENT TO THE TRIAL

STATE OF TENNESSEE	No. 113725
Vs.	In the Criminal Court of Hamilton County, Tennessee
WILBURN E. SMITH	First Division

MOTION

Comes the defendant, by counsel, and moves the Court to permit the effective completion of the medical examinations and tests provided for in the Order filed upon March 4, 1969 in that said examinations and tests are scheduled to be conducted by Dr. Walter Boehm on March 26, 1969 at 9:30 a.m. regardless of the fact defendant was tried upon March 12 and 13, 1969 and found guilty of first degree murder as charged and sentenced to 99 years in the penitentiary.

In support hereof it is respectfully shown that the aforesaid appointment for the examination and testing was set by Dr. Walter Boehm after the trial of the defendant had

begun on March 12, 1969; and, further, that the Court has allowed 40 days within which to file a motion for a new trial, within which period Dr. Boehm will have completed the tests and the defendant will then have the opportunity to incorporate Dr. Boehm's findings in his motion for a new trial.

/s/ 3/14/69
H. H. Gearinger
Attorney for Defendant

COPY OF ORDER DATED MARCH 24, 1969, ALLOWING PETITIONER TO BE TAKEN FROM JAIL TO DR. BOEHM'S OFFICE AND ERLANGER HOSPITAL

STATE OF TENNESSEE
Vs.
WILBURN SMITH

No. 113725
In the Criminal Court of
Hamilton County, Tennessee
First Division

ORDER

(Filed March 24, 1969)

Heretofore, upon March 4, 1969, an order was entered permitting and providing for the testing of the defendant by Dr. Walter Boehm and the said tests having not been had prior to the trial of defendant upon March 12 and 13,

1969, and upon the motion of the defendant for the permitting of the examination and testing of defendant by Dr. Walter Boehm on March 26, 1969, it is

ORDERED that the prior order entered upon March 4, 1969 is and continues to be a valid order which by this order is intended to encompass the examination and testing of Dr. Walter Boehm as prescribed by the order entered upon March 4, 1969.

It is further ORDERED that the Sheriff of Hamilton County, in whose custody the defendant remains, will produce the defendant at the offices of Dr. Walter Boehm, 1010 E. Third Street, Chattanooga, Tennessee, for the said examination and testing and, if necessary, provide for the placing of defendant in maximum security if it be necessary he be admitted to and confined in Baroness Erlanger Hospital until the completion of the tests by Dr. Walter Boehm.

Enter this the 24 day of March, 1969.

/s/ Campbell Carden
Campbell Carden, Judge

ORDERS OF THE COURT OF CRIMINAL APPEALS DENYING PETITION TO REHEAR

WILBURN E. SMITH
V.
STATE OF TENNESSEE
} HAMILTON CRIMINAL NO. 147

ORDER

(Filed December 3, 1969)

The plaintiff in error in the above-styled case has filed a motion to be allowed to orally argue a petition to rehear filed in the above-styled cause.

On consideration of this motion, the Court is of the opinion that said motion is not well taken and should be and is hereby and forthwith DENIED.

This 3rd day of December, 1969.

ENTER.

.....
MARK A. WALKER, PJ.

.....
ORIS D. HYDER, J.

.....
ROBERT K. DWYER, J.

THE COURT OF CRIMINAL APPEALS OF TENNESSEE, KNOXVILLE

[fol. 1]

WILBURN E. SMITH Plaintiff in Error	No. 147
v.	Hamilton County
STATE OF TENNESSEE Defendant in Error	Hon. Campbell Carden, Judge

ON PETITION TO REHEAR

(Filed December 16, 1969)

The defendant has filed a courteous petition to rehear. He relies in his petition to rehear on two grounds, namely: (1) The trial court abused its discretion in not granting defendant a short continuance in order to secure medical testimony for the defense; and (2) the trial court erred in not charging requests bottomed on the American Law Institute's test of criminal responsibility.

Counsel for the defendant presents no new matter of law or fact overlooked by this Court when we overruled defendant's assignment of error pertaining to the trial court's action in not again granting defendant a continuance. As set out in our opinion, presently-retained counsel and previously-retained counsel had secured a number of continuances in the trial court. Assignment of error number one in the petition is again accordingly overruled.

In defendant's second assignment he again asked this Court to set aside the M'Naghten rule adhered to in this State as the test for criminal responsibility. Defendant

[fol. 2] in his petition states this Court was in error when we said in our opinion, quoting from *Spurlock v. State*, 212 Tenn. 132, 368 S.W.2d 299, that only one state and but two Federal circuits had abandoned the M'Naghten rule. We are, as we were then, well aware that since *Spurlock v. State*, *supra*, other Federal circuits have abandoned the M'Naghten rule. This Court was not in error but there was an erroneous assumption on the part of the defendant as to that fact. It is apparent from this petition, as well as from the record, that counsel for the defendant does not like nor agree with the M'-Naghten rule. In reference to the antiquity of the M'-Naghten rule, he says we should not look to the past for wisdom, for that would be like looking in a rear-view mirror. Neither should we decide our present by what might be in the future because that would be chaotic, indeed. In *City of Paris, Tennessee v. Paris-Henry County Public Utility District*, 207 Tenn. 388, 340 S.W.2d 885, 890, the following language may be found:

> "'The office of a petition to rehear is to call the attention of the court to matters overlooked, not to those things which the counsel supposes were improperly decided after full consideration' (Louisville & N. Railroad Co. v. United States Fidelity & Guaranty Co., 125 Tenn. 658, 691, 148 S.W. 671, 680). Gulf, M. & O. R. Co. v. Underwood, 182 Tenn. 467, 476, 187 S.W.2d 777, 780; Colbaugh v. State, 188 Tenn. 103, 112, 216 S.W.2d 741.)" Delta Loan & Finance Co. of Tenn. v. Long, Tenn., 337 S.W.2d 606, 607."

A petition for rehearing should never be used merely for the purpose of re-arguing the case on points already considered and determined, unless some new and decisive authority has been discovered which was overlooked by

[fol. 3] the Court. There has been no new matter of law or fact presented in this petition to rehear which was overlooked or not considered by this Court when it rendered its opinion. Therefore, respectfully, the petition to rehear is denied.

/s/ Robert K. Dwyer
Robert K. Dwyer

Concur:

/s/ William S. Russell
William S. Russell

/s/ John A. Mitchell
John A. Mitchell

ORDER OF THE SUPREME COURT OF TENNESSEE DATED MAY 4, 1970 DENYING PETITION TO REHEAR

WILBURN E. SMITH
v.
STATE OF TENNESSEE
} HAMILTON CRIMINAL

MEMORANDUM DENYING PETITION TO REHEAR PETITION FOR CERTIORARI

(Filed May 4, 1970)

Counsel for the defendant has filed a very earnest petition to rehear, which the Court has carefully read, and

finding nothing new not heretofore considered, the petition to rehear is denied.

/s/ Erby L. Jenkins
ERBY L. JENKINS, S. J.

Dyer, C. J.
Creson, J.
Humphreys, J.

Concur:

McCanless, Jr., not participating.